missioners may in their absolute discretion think fit for the maintenance, support or benefit of such contributing member and his wife, family, relatives and persons dependent on him or any one or more of them."

This rule gives the Commissioners an absolute discretion whether they pay the Donations side to the Bankrupt or for the support of his family and accordingly this part of the Fund could not vest in the Official Assignee (See *re Samykanoo*, 1927 S.S.L.R. p.34).

In Singapore however the position is entirely different. Rule 22 sub-rule 2 of the Singapore Provident Fund Rules, 1923 provides that a member may retire voluntarily after 10 years continuous approved service, and the bankrupt did resign with the approval of the Commissioners. Thereupon the rule provides "there shall be paid to such members out of the fund the whole of the accounts standing at the time aforesaid to the credit of both parts of his account with the Fund."

It appears to me therefore that accepting as I do the principle laid down in "In re Daniel," both parts of the Provident Fund, so far as Singapore is concerned *prima facie* vest in the Official Assignee.

The Official Assignee admits that any moneys added to the Fund since the date of the bankruptcy are after-acquired property in the nature of personal earnings. It has been held in England (*In re Roberts*, 1900, 1 Q.B. p.122) that personal earnings vest in the trustee in bankruptcy except such part as is necessary for the maintenance of the bankrupt and his family. It is however necessary for the trustee to intervene (See *Williams* p.339) and in the present case the Official Assignee has intervened although at a somewhat late hour and claims what is left of the Provident Fund.

In my opinion he is entitled to both sides of the fund for the benefit of the creditors.

Order accordingly.

Solicitor for the Bankrupt—*W. A. N. Battenberg*

[ORIGINAL CIVIL JURISDICTION]
TERRELL, J.
August 10, 1935.

H. STACEY v. DIAMOND METAL PRODUCTS CO., LTD. & ANOR.

[SINGAPORE IN FORMA PAUPERIS SUIT No. 426 of 1934]

Evidence—Admission of affidavit under Order 35 Rule 1.

After a threat of action, but before the writ, H. on the request of the Defendants made in England an affidavit as to certain matters in issue in the action of which no other person could give evidence for the Defendants. H. died before the issue of the writ.

Held, that the affidavit should not be used as evidence under Order 35 Rule 1 (2) as it was not made in a pending cause or matter and was therefore inadmissible as an affidavit and also because the Plaintiff had no opportunity of cross-examining H.

Adjourned Summonses.

Briggs for Defendants (Applicants).

Gale for Plaintiff (Respondent).

The facts and arguments appear from the judgment.

Cur. Ad. Vult.

TERRELL, J.—This is an application by the defendant that an affidavit of one J. F. S. Hunter, endorsed upon a letter written by Hunter to the first defendant company on the 12th July, 1934, may be received in evidence at the trial of this action in proof of the several facts therein set out. The application is made under Order 35 rule 1 (2) of the Civil Procedure Rules, 1934.

The writ in this action was issued on the 10th August, 1934. Between the date of the letter and the issue of the writ, Hunter died in England. There can, I think, be no doubt that if he had been alive his evidence would have been very material, and the question before the court is whether his previous statement can be accepted in evidence under the provisions of Order 35 rule 1(2).

Generally speaking all evidence at a trial must be given *viva voce* [Ord. 35 r. 1(1)] and the witnesses must be subject to cross-examination in the usual way before the trial Judge. The rules however provide for a certain latitude, and in proper cases witnesses may be examined *de bene esse*, or on commission etc., and their depositions may be read provided that the witness is not available at the trial. It is also provided by Order 35 Rule 1(2) that an order may be made that "any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the Court or the Judge thinks reasonable."

The authorities which have been cited to me show I think that the part of the rule quoted above (which corresponds with English 0. 37 r. 1) contemplated two different sets of circumstances. The first part deals with the formal proof of some isolated fact; the exercise of the power is discretionary, and in the case of *Cook* v. *Tomlinson*, 24 W.R. 851 where the plaintiff required a will to be proved in solemn form, the President of the Probate Division refused to allow the execution or attestation of the will to be proved by affidavit as he considered that the facts sought to be proved by affidavit were the gist of the action and not isolated facts within the meaning of the Rule.

The second part deals with the admission of affidavit evidence not sworn for the purpose of the trial but sworn in connection with other proceedings. In only one case *Gornall* v. *Mason*, 12

P.D. 142, was an affidavit made in another proceeding admitted. In that case which was a suit for revocation of a probate, an affidavit made by an attesting witness at the time of proving the will in the District Registry was admitted, not without hesitation, by Butt, J. I do not think that this decision can be relied on as showing anything except the practice that was followed in an isolated case and in a Probate matter.

This leaves the cases where the affidavit has been sworn, perhaps for other purposes, but in the same proceeding. (See *Drewitt* v. *Drewitt*, 58 L.T. 684 and *Elias* v. *Griffith*, 46 L.J. Ch. 806). In the latter case Hall V. C. admitted the affidavit because the deponent might have been cross-examined upon it " which is the ordinary test of admissibility of a deposition made in the cause by a deceased witness." This principle is recognised in Order 35 rule 1 (3) which reads as follows:—

> " When it appears to the Court or a Judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

It will be seen therefore that when the witness can be produced the Court has not even a discretion to admit his evidence on affidavit, if the opposite party objects.

Mr. Gale on behalf of the respondent to this summons submits that the affidavit is a nullity I need not consider his arguments based on the form of the affidavit and the absence of any heading as these are irregularities which might in a proper case be waived. The argument however that no affidavit can be sworn in an action which has not yet been commenced is on a different footing. This is more than an irregularity and makes the affidavit *qua* affidavit, entirely inadmissible. Certainly there may be cases in which an affidavit sworn a day or two previously, or even affidavits which have not even been sworn, have been used on interlocutory application, on counsel's undertaking that the affidavit shall be resworn, or sworn and filed as the case may be. But when the strict rules are relaxed in such instances the principle is not sacrificed, as the Court acts on the assumption that counsel's undertaking will be honoured, and when that has been done the requirements of the Court's practice have been fully complied with. Apart from such cases affidavits to be used in Court proceedings can only be sworn and filed in proceedings that are actually pending. See the Annual Practice p. 910 (note " Evidence "), *Daniell's* Chancery Practice 8th Ed. p. 1411, *Francombe* v. *Francombe*, 11 L.T. 757 in which it is pointed out that the Court will not reject an affidavit which has been sworn before the proceedings were actually intituled provided that it is dated the same day. See also *Silber* v. *Lewin*, 33 Sol. Jo. 707 and *Bowen* v. *Bowen*, L.R. (Ir.) 7 Eq. 251. Hunter's letter therefore is *prima facie* inadmissible as an affidavit in these proceedings, and as he is dead it never can become admissible by being resworn.

Even if from any point of view it could be treated as a affidavit in an intended action, there is still the fatal objection that the plaintiff has never had the opportunity of cross-examining Hunter, and that as Hall V. C. said, is the true test. Even therefore if this had been an affidavit sworn since the commencement of the proceedings I do not think that the Court ought to exercise its discretion in the defendant's favour. I also think that the present application is an attempt to get round the provisions of the Evidence Ordinance. A statement by a person who is dead is admissible in certain circumstances. I express no opinion as to whether these circumstances have arisen, but if they have not, it is, I think, clear that the provisions of the Evidence Ordinance cannot be circumvented by recourse to Rules and Orders which only profess to deal with procedure and not with admissibility.

The costs will be costs in the cause.

Application refused.

Solicitor for the Plaintiff—*P. H. Battishill.*

Solicitors for the Defendants—
Braddell Brothers.

END OF THE STRAITS SETTLEMENTS OFFICIAL REPORTS.